

From: Franklin D Silberstein/DSMD/HQ/BOC
To: tyra.dent.smith@census.gov, Benjamin.T.Felder@census.gov,
Kristin.L.Palmer@census.gov, William.Searles.Schauman@census.gov
bcc: [REDACTED]

Date: Tuesday, September 01, 2009 03:33PM
Subject: Re: Third Step Grievance Filed

Ben,

Just to make sure we have a record filing this FLSA grievance today, I am sending you a scanned copy of this grievance. *Just to make sure Tyra Dent Smith gets a copy of this today, I am sending her a copy too.*

Frank

Attachments:

Grievance filed Sept 1st 2009 134 pm.pdf

KLP 9/1/09
KLP 1:34pm

FORM BC-1575(ef)
(10-3-90)

U.S. DEPARTMENT OF COMMERCE
Economics and Statistics Administration
U.S. CENSUS BUREAU

Section I

To be completed by grievant.

**OFFICIAL GRIEVANCE DOCUMENT
NEGOTIATED GRIEVANCE PROCEDURE
STEP (2) AND STEP (3)**

1. Name of grievant — Last, first, middle initial

AFE Local 2782

NOTE — Refer to Article 8 of the Labor Agreement for information regarding grievances. If additional space is needed, use "Remarks" section on page 2.

2. Statement of grievance — State specifically when and in what manner grievance arose. State specifically what in the agreement, regulation, or condition of employment has been violated.

Enter date the grieved instance occurred. →

Month	Day	Year
9	1	2009

See attachment for details of the grievance.

3. Relief sought

See attachment

4. Signature of grievant

Union by Chief Steward Franklin Silberstein

Date

9-1-2009

5. Designation of Union Representative

Name
Franklin Silberstein, Chief Steward

Date

09/01/2009

Section II

To be completed by Step (2) deciding official.

1. Name

2. Title

	Date		
	Month	Day	Year
3. Grievance received			
4. Grievance meeting			
5. Decision to grievant			
6. Grievance decision — Mark (X) one box and explain in item 7.	<input type="checkbox"/> Sustained <input type="checkbox"/> Denied <input type="checkbox"/> Other		

7. Summary of Step (2) decision

Section III To be completed by Step (3) deciding official.

1. Name	2. Title
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	Date			7. Summary of Step (3) decision
	Month			
3. Grievance received				
4. Grievance meeting				
5. Decision to grievant				
6. Grievance decision — <i>Mark (X) one box and explain in item 7.</i>	<input type="checkbox"/>	Sustained		
	<input type="checkbox"/>	Denied		
	<input type="checkbox"/>	Other		

Remarks

Pursuant to Article 8.8 of the Contract between the parties, the Union hereby files the following Union Grievance.

The Union hereby grieves all conduct by the Agency affecting all AFGE Census (HQ) bargaining unit(s) employees from September 1, 2006, through the date of the final decision on this grievance of Agency actions (or inactions) as to bargaining unit employees that violate the Fair Labor Standards Act (FLSA). The term bargaining unit employees include any Agency employee who was a member of an AFGE bargaining unit at any time from September 1, 2006, through the present date (the Backpay Period). These Agency violations include, as to bargaining unit employees, *inter alia*, improper exemption from the FLSA; failure to credit hours worked; failure to credit hours worked and not documented (including suffer or permit hours); failure to pay overtime at an appropriate rate under the FLSA; failure to properly pay FLSA rates and/or hours for travel or leave.

The Union demands, as a remedy, that the Agency appropriately calculate and pay bargaining unit employees pay under the FLSA. Further, the Union demands that the Agency recalculate all wages paid bargaining unit employees that do not comply with the FLSA and provide liquidated damages (or interest-whatever is higher) for having improperly paid bargaining unit employees during the Backpay Period. The Union also demands that it be awarded all appropriate costs and attorney fees allowable under law.

The Union hereby designates the following as its representative in this matter and directs the Agency to deal directly with its designated representative.

AFGE GCO

[REDACTED]



UNITED STATES DEPARTMENT OF COMMERCE
Economics and Statistics Administration
U.S. Census Bureau
Washington, DC 20233-0001

SEP 04 2009

[REDACTED]
AFGE Office of the General Counsel
80 F Street, N.W.
Washington, DC 20001

Dear [REDACTED]

I am in receipt of the step (3) union grievance filed by Frank Silberstein, Chief Steward, AFGE Local 2782, on September 1, 2009, regarding the following:

“The Union hereby grieves all conduct by the Agency affecting all AFGE Census (HQ) bargaining unit(s) employees from September 1, 2006, through the date of the final decision on this grievance of Agency action (or inactions) as to bargaining unit employees that violate the Fair Labor Standards Act (FLSA). The term bargaining unit employees include any Agency employee who was a member of an AFGE bargaining unit at any time from September 1, 2006, through the present date (the Backpay Period). These Agency violations include, as to bargaining unit employees, *inter alia*, improper exemption from FLSA; failure to credit hours worked; failure to credit hours worked and not documented (including suffer or permit hours; failure to pay overtime at an appropriate rate under FLSA; failure to properly pay FLSA rates and/or hours for travel or leave.

The Union demands, as a remedy, that the Agency appropriately calculate and pay bargaining unit employees pay under the FLSA. Further, the Union demands that the Agency recalculate all wages paid bargaining unit employees that do not comply with the FLSA and provide liquidated damages (or interest-whatever is higher) for having improperly paid bargaining unit employees during the Backpay Period. The Union also demands that it be awarded all appropriate costs and attorney fees allowable under the law.”

Chief Steward Silberstein advises that you have been designated as the representative for the AFGE Local 2782 in this matter. According to Article 8.8 of our Labor Agreement (copy enclosed), the Chief, Personnel Division, will return an improperly filed grievance to the grievant/representative with a statement of its deficiencies. The grievant/representative will have 5 additional days from the receipt of the notice of deficiency to refile the grievance with the deficiencies corrected.

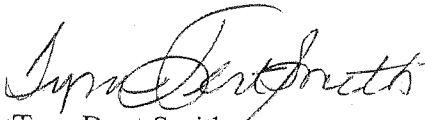
I am notifying you that I find this grievance to be improperly filed. Our Labor Agreement specifies that written grievances must contain information regarding the **specific** action, omission, or condition causing the grievance and/or the provision of our Labor Agreement, law or regulation allegedly violated, misinterpreted or misapplied, if

any. In the written grievance, Chief Steward Silberstein has failed to provide specific information to serve as a basis for claiming that the Agency has or is violating the FLSA. Therefore, I find this grievance to be deficient because it does not contain the necessary information required for filing a step (3) grievance under the terms of our Labor Agreement.

Based on the aforementioned, I am returning this grievance to you as improperly filed.

If you have any questions concerning this matter, please direct them to Ben Felder, Chief of our Labor Management Branch, at (301) 763-2651.

Sincerely,



Tyra Dent Smith
Chief, Human Resources Division

Enclosures

cc: Frank Silberstein

September 9, 2009

Tyra Dent Smith
Chief, Human Resources Division
United States Department of Commerce
Economics and Statistics Administration
U.S. Census Bureau
4600 Silver Hill Road - Room 2J436
Washington, DC 20233-0001

VIA FACSIMILE/UPS

Tel#: 301-763-3721
Fax#: 301-763-4990

Re: AFGE L-2782 Grievance-Sept. 1, 2009

Dear Ms. Smith:

This letter is in response to your letter dated September 4, 2009 (hereinafter "Letter"), wherein you responded to the grievance filed by AFGE L-2782, on September 1, 2009 (hereinafter the "Grievance"). In your Letter you have stated that the grievance was "improperly filed". I disagree. The Grievance, as quoted in your letter, clearly states the subject of the grievance, who is covered by the grievance, the law that the Agency is alleged to have breached in its dealings with the AFGE bargaining unit employees, the liability period, and the remedy sought.

The FLRA has clearly held that alleged violation of the FLSA by a federal government agency is remediable via the grievance process. U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and American Federation of Government Employees, 44 FLRA No. 66, 44 FLRA 773 (April 14, 1992). In the SSA and subsequent cases, the FLRA has clearly held that FLSA claims are subject both to the negotiated grievance procedure under 5 U.S.C. §7121 and such claims are clearly arbitrable.

While not necessary, I would further note that the Contract between the parties, Article 15.5 explicitly requires the Employer/Agency to pay overtime pursuant to "...applicable laws, rules, and regulations." The Grievance clearly alleges that the Agency's practice in payment of FLSA violates the law and its accompanying rules and regulations.

Tyra Dent Smith
September 9, 2009
Page 2 of 2

I (as the attorney explicitly designated by AFGE L-2782 as its representative in the Grievance) therefore reject the Agency's contention that the Grievance was "improperly filed" as alleged in your letter.

As a side-bar, I would note that I hereby offer to work with the Agency in insuring that the Agency accurately identifies, computes, and timely pays AFGE L-2782 bargaining unit employees FLSA overtime that has not been properly computed and/or paid by the Agency during the claims period as specified in the Grievance. I would note that the Agency is liable for attorney fees in this matter pursuant to both 5 U.S.C. §5596 and (more importantly), 29 U.S.C. §216(b) at my full "Laffey Matrix" hourly rate of \$465.00 per hour. Ms. Dent, we can do this the easy way (via working constructively together) which will substantially reduce the Agency's exposure to attorney fees or we can fight. I am prepared to do either. If you care to research the matter you will find that I have been litigating FLSA overtime pay cases for the AFGE General Counsel's Office for over 25 years and have been directly involved in making much of the federal sector FLSA case law. In the end the Agency will end up properly paying its AFGE bargaining unit employees. The question you have to ask is whether it's in the Agency's best interest to pay hundreds of thousands of dollars in addition to the back pay. Again, the choice is yours.

I would appreciate a timely reply to the subjects of this letter and certainly remain open to communications as to the subject matter of the Grievance.

Sincerely,

A black rectangular redaction box covering the signature of the sender.

General Counsel - Litigation

cc: Frank Silberstein